

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Case Nos. 08-13555 (JMP); 08-01420 (JMP) (SIPA)
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5 In the Matter of:

6
7 LEHMAN BROTHERS HOLDINGS, INC., et al.
8 Debtors.

9 - - - - -x

10 In the Matter of:

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12 LEHMAN BROTHERS, INC.
13 Debtor.

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15 United States Bankruptcy Court
16 One Bowling Green
17 New York, New York

18
19 October 8, 2010
20 10:08 AM

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22 B E F O R E:
23 HON. JAMES M. PECK
24 U.S. BANKRUPTCY JUDGE

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HEARING re 60(b) Motions.

Transcribed by: Penina Wolicki

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Please be seated. Good morning.

4 MR. SCHILLER: Good morning, Your Honor. Jonathan
5 Schiller for Barclays.

6 Just to describe what the parties have agreed for Your
7 Honor this morning. We have the PwC argument to resume, as
8 Your Honor scheduled. I had mentioned and perhaps others had
9 mentioned that we have other exhibit issues. But we continue
10 to discuss those, and would like, if necessary, to reserve an
11 hour on the 18th, if that's convenient for the Court. And
12 we'll advise if we need it next week. It may be that we won't.

13 THE COURT: Okay.

14 MR. SCHILLER: There's no longer a rebuttal case
15 issue. They've withdrawn their request over that one witness,
16 so we do not need the 18th for a witness. I thought I should
17 tell the Court that.

18 And finally, the parties would like a brief chambers
19 conference with Your Honor to discuss the closing schedule.

20 THE COURT: Fine.

21 MR. SCHILLER: The parties are in agreement, but we
22 need Your Honor's guidance.

23 THE COURT: And do you want to do that today?

24 MR. SCHILLER: Yes, if that's convenient for the
25 Court?

1 THE COURT: That would be fine.

2 MR. SCHILLER: Thank you. Mr. Hume will resume oral
3 argument on our motion.

4 THE COURT: Okay.

5 MR. HUME: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. HUME: For the record, Hamish Hume, Boies,
8 Schiller, for Barclays.

9 Obviously, Your Honor, we've submitted our letter
10 brief. The movants have submitted theirs. It's given us all a
11 chance to look a little more closely at the issue raised by Mr.
12 Gaffey about this paper expert issue.

13 I think what I would like to do, Your Honor, is begin
14 by summarizing exactly what our position is in terms of what
15 we're asking for in the admission of these documents, and then
16 address the law, and then just briefly show some of the
17 documents again and discuss what they are.

18 We do submit that all of the PwC documents that are at
19 issue here are business records, and therefore exempt from the
20 hearsay rule, and can be admitted for all purposes. That is
21 our first argument. And we will be addressing the 702
22 objection to that argument in a moment.

23 I do want to make clear, because it was addressed in
24 Mr. Gaffey's response letter, what our alternative or fallback
25 argument is, for the limited purpose of admission. I take the

1 point that the limited purpose of admission to show the
2 thoroughness of the audit. Mr. Gaffey says it doesn't really
3 make a difference; it's the same thing. I don't think that's
4 quite right, and I'd like to try to refine in two respects the
5 limited purpose of admission argument. There may be two
6 somewhat related aspects to it.

7 The first is, the movants do have an expert, Mr.
8 Garvey, whose report, if I could, I'd like to pull up briefly.
9 And perhaps if I could be given a pointer, it might help also.
10 Mr. Garvey --

11 THE COURT: You really like that pointer, don't you.

12 MR. HUME: I've become dependent on it, yes.

13 THE COURT: I can see that.

14 MR. HUME: Thank you. So Mr. Garvey was the movants'
15 accounting expert. And while he did, I think, admit in trial
16 testimony and deposition that he wasn't opining on the -- I
17 can't remember his precise words -- he did caveat that he
18 wasn't giving an opinion to some degree on PwC's audit or
19 whether they did this or that. He does give these opinions in
20 his report which is now in evidence, "While PwC performed
21 certain procedures, it is not clear whether an extensive
22 investigation and testing was performed." And he goes on to
23 list a series of bullet points of what he considered an
24 extensive investigation and testing. And this is taken as a
25 rebuttal -- he is critiquing Paul Pfleiderer's reliance on the

1 PwC documents here and saying you can't say they did an
2 extensive investigation and testing. So he's giving expert
3 opinion on that issue.

4 And paragraph 83 -- if we could go to that next
5 paragraph -- has the following opinion: "Based on my review of
6 the PwC procedures performed on Barclays' exit price marks, PwC
7 most likely did not perform an extensive investigation and
8 testing in light of the following deficiencies in the
9 valuations on the acquisition balance sheet."

10 Now, this does get confusing, because Mr. Garvey also
11 testifies that he's not giving an opinion on the acquisition
12 balance sheet and not giving an opinion if the acquisition
13 balance sheet undervalues the assets. But on the other hand,
14 he critiques those values, as do all of movants' experts.

15 The simple point I'm making, Your Honor, is in these
16 two paragraphs, their expert does offer opinion on whether or
17 not PwC did or did not conduct a thorough investigation --
18 perform investigation and testing. So one limited purpose, if
19 the Court rejects our argument that they're business records,
20 which we strongly submit they are, would be to rebut movants'
21 assertion that PwC did not perform extensive testing. We think
22 our documents evidence that. In fact, we think the ten boxes
23 of documents produced show that. But we're not going to ask to
24 admit all of them, although we'd be happy to admit all of them.

25 THE COURT: I don't want them.

1 MR. HUME: There is a second broader concept for which
2 this limited purpose admission would be relevant. And it kind
3 of goes somewhat to either an insinuation or a premise of the
4 movants' case, which is that beginning September 15th and 16th
5 of 2008, there was a pattern of conduct that -- this is my word
6 not theirs, but interpreting their allegations, is that there
7 is essentially some form of conspiracy here to hide five
8 billion dollars of value: first to hide it from the Court by
9 saying seventy billion when it was really seventy five. And
10 then that agreement to secretly hide value continued through
11 the end of the week to mark things down five billion, to hide
12 value.

13 And then it continued through the product control
14 group valuations, all the way through October, November,
15 December, January, February, and that it must have involved a
16 huge number of people who were either duped or part of this
17 agreement to mark down and hide value. It must have extended
18 even to the auditors, who must have been either duped or
19 involved in this agreement to hide value.

20 And even if the PwC documents do not come in for the
21 truth of the assertions they make: the findings of this
22 methodology was reasonable and that methodology was reasonable;
23 they should at least come in for the limited purpose of showing
24 there was extensive involvement of many people that have to be
25 found to either have been duped or been in on this secret

1 agreement/conspiracy that movants assert/insinuate in their
2 case.

3 So I just wanted at the outset, even though we
4 strongly do ask the Court to accept these documents for all
5 purposes as business records, that there is a robust and
6 conceptually distinct limited purpose in two different
7 respects, for which they can be admitted.

8 Now, with respect to the legal issue raised by Mr.
9 Gaffey the other day, whether or not a business record should
10 be barred as expert opinion. I hesitate to call it
11 interesting, because it may credit the issue, but it is
12 interesting. And I'd like to look at the rules, beginning with
13 Rule 803(6), the business record rule. If we could blow that
14 up?

15 And here's what the rule says. This is the business
16 record rule exception to the hearsay law. It says that the
17 following things are not hearsay: "A memorandum, report,
18 record, or data compilation, in any form, of acts, events,
19 conditions, opinions," can you please highlight "opinions". "A
20 memorandum, report, record, of opinions made at or near the
21 time by, or from information transmitted by, a person with
22 knowledge, if kept in the course of a regularly conducted
23 business activity, and if it was the regular practice of that
24 business activity to make the memorandum, report, record or
25 data compilation, all as shown by the testimony of the

1 custodian or other qualified witness, or by certification."

2 And then it goes on to say, "unless the source of
3 information or the method or circumstances of preparation
4 indicate lack of trustworthiness." That hasn't been alleged
5 here, but I'll come back to that. And then it says something
6 else that I think is very important. It says, "The term
7 'business'", in terms of business record, "The term 'business'
8 as used in this paragraph includes," what I'd really like you
9 to do is highlight "profession", it includes, "association,
10 profession, occupation, and calling of every kind."

11 I don't think I'm parsing this too finely to say that
12 the rule says that a memorandum or report with opinions from a
13 profession -- a professional opinion -- is a business record,
14 not subject to the hearsay rule. That's what the rule on its
15 face says; a long-established rule applied in courts regularly,
16 for many, many years.

17 So you have one rule that says professional
18 opinions -- memoranda of professional opinions, if kept in the
19 regular course of business, and there's no indication of a lack
20 of trustworthiness, comes in. It's not hearsay.

21 Now, let's look at 702. 702 says, "If scientific,
22 technical, or other specialized knowledge will assist the trier
23 of fact to understand the evidence, a witness qualified as an
24 expert," can testify. And then it gives the qualifications
25 that are familiar to the Court and elaborated upon by the

1 Supreme Court's Daubert decision and its progeny.

2 Now, how do you reconcile these two rules? If you
3 have one rule that says you have professional opinion is not
4 hearsay, it can come in; you have another rule that says if
5 scientific, technical or specialized knowledge will assist, it
6 can come in if these things are satisfied. Your Honor, I
7 submit this. There's -- first of all, there's not a lot of
8 case law that's addressed any perceived tension between these
9 two rules, but the cases that have addressed it have gone our
10 way, almost uniformly. And I think the only circuit court to
11 address it have. There are two cases identified by movants
12 that I'll address in a moment, that seem to support their
13 argument. But I think the context shows why.

14 And that context is this. If the report that's being
15 offered with the memorandum, the written document, with the
16 professional opinion is done by someone retained for purpose of
17 litigation, for the purpose of helping the litigation and the
18 litigants' cause in that litigation, then 702 comes into play.
19 If it's within the specter of litigation, I think some Courts
20 have said, look, then you've got an issue of whether this
21 person was retained as an expert in the case. But otherwise,
22 if it's part of the regular activity, it comes in.

23 So, first of all, we have a number of cases that
24 simply allow auditor reports to come in as business records for
25 all purposes, with the issue of 702 not even arising. And I

1 think -- I hope we've listed those cases in our letter. And I
2 can read them just briefly for the Court, because there're
3 Second Circuit cases allowing auditors' and accountants' notes
4 and work papers admitted as business records. And this issue
5 of 702 does not even arise. Phoenix Associates v. Stone, 60
6 F.3d 95 (2d Cir. 1995); United States v. Frazier, 53 F.3d 1105
7 (10th Cir. 1995); Hoselton v. Metz Baking, 48 F.3d 1056 (8th
8 Cir. 1995). And there's a Third Circuit case, and then there's
9 a Southern District of New York case, Nasson Renders (ph.) v.
10 Aurash, with a Westlaw cite of 2005 WL 2875333 (S.D.N.Y. 2005).
11 I'm sorry to read those into the record. I believe they're in
12 the letter, but if they're not, we can address that.

13 So those cases, it just comes in and the issue doesn't
14 arise. There are, then, cases where people have raised the 702
15 argument, and the Courts have explicitly rejected it. And I'd
16 like to just bring the Court's -- ask the Court's attention to
17 the two cases I'm sure we cited in our letter: In re
18 Acceptance Insurance Companies case from the District of
19 Nebraska 2004. That is directly on point. And it, in fact,
20 happens to involve PwC documents.

21 It was a securities fraud case where the insurance
22 company had been alleged to not have been properly reserving
23 for certain kinds of claims that were coming against it that
24 were thought to be legitimate based on legal developments. And
25 they wanted their auditors' reports in evidence for all

1 purposes to show that they were adequately reserving. And the
2 other side said, hey, wait a minute, that's a 702 problem.
3 You're introducing this expert evidence. And it was thoroughly
4 analyzed by the Court that said your witnesses' expertise in a
5 given field of study does not transform that witness into an
6 expert witness under Rule 702.

7 So we would say that case is directly on point and
8 strongly supports our position. And the same thing with
9 respect to a Ninth Circuit case, the Licavoli case. Our
10 colleagues at the movants say that case didn't address the
11 issue. But it does address the issue. The defendant, I think,
12 Licavoli, argued that although 803(6) authorized the admission,
13 it does not dispense with the general requirements of 702.
14 That argument was explicitly raised and the Ninth Circuit
15 rejected it.

16 So the balance of the case law -- there's also an
17 Eighth Circuit case, Shelton v. Consumer Products Safety
18 Commission, that addresses the issue and rejects it. I must
19 have misspoke a moment ago, because I said all circuit court
20 cases went our way. One of their cases is a Fifth Circuit
21 case. And so let me address what I believe are the only cases
22 that have supported the movants' position on the relationship
23 of 803(6) and 702.

24 First, there's a Court of Claims case from 1979 that I
25 believe excluded an appraisal report because it was not

1 "incident to or part of factual reports of contemporaneous
2 events or transactions." Again, I think it's drawing -- that
3 decision is drawing a distinction between: is this
4 professional opinion and a contemporaneous fact that's happened
5 at the time as opposed to something that happened during
6 litigation or within the zone of the litigation, and it looks
7 like it may lack the trustworthiness of the contemporaneous
8 business record.

9 The other two cases they rely on, I think, implicitly
10 have that context. But you have to really look closely to see
11 them. They're both employment cases. I think they're quite a
12 different context from auditor -- the auditing records we're
13 talking about here. One of them is McCulley v. JTM Industries.
14 That's the Fifth Circuit case. I would note that it's an
15 unpublished properian (sic) case. I'm not certain what the
16 Fifth Circuit's rules were at the time about citing such cases.
17 But in any event, I think that bears on its weight.

18 And in that case you have an employee who had a long
19 history of disputes with his employer. His father and
20 mother -- or father-in-law and mother-in-law were terminated by
21 the employer -- they had the same employer. There was a
22 history of alleged bad behavior and bad attitudes. He had some
23 form of counseling service or assessment service he was seeing.
24 And he tried to get their reports in to show that he was, I
25 think, you know -- he tried to bolster his case that he's been

1 wrongfully terminated in a retaliatory termination.

2 So you had at least something within the zone of
3 litigation that was prepared. It looked like it might have
4 been influenced by the dispute, and therefore was excluded
5 under Rule 702. I'm saying we think the decision is correct.
6 But I can see a clear distinction between that and this case.

7 The same is true for Martin v. Discount Smoke Shop,
8 their other case from the Central District of Illinois. Again,
9 it's an employee case involving an employee who had learning
10 disabilities and had a long series of issues with her employer
11 of whether or not she was fit for the job. And she had tried
12 to get in -- she was terminated, and after her termination date
13 she had a report issued by some, again, assessment center she
14 was seeing that was assessing her abilities and her learning
15 disabilities. And she tried to get that into evidence to help
16 her employment discrimination case.

17 I note that most of the other business records from
18 that professional service were admitted, uncontested, but
19 admitted. But it's the one that was done after her termination
20 that the defendant said you're just trying to get in expert
21 testimony, and the Court excluded it.

22 The point of all this, Your Honor, is when you read
23 the cases, it even looks like the dividing line for when 702 is
24 implicated is when you're in a litigation context or at least
25 potentially in a litigation context, and the party is trying to

1 use something -- a report, to get around the expert rules.

2 This is not what is happening in this case.

3 In this case we had months after the sale order was
4 issued in which Barclays was accounting for the transaction;
5 PwC was conducting a regular audit of the normal half-year
6 results. The acquisition balance sheet became part of that.
7 It went on for months, and they published the acquisition
8 balance sheet. At that time, there was no specter of
9 litigation, at least as far as Barclays knew. Movants were
10 defending the sale order on appeal. You've heard our merits
11 case on all of this. But at least from Barclays' perspective,
12 there was no specter of litigation. So these were regular
13 audit reports. They come in squarely as professional opinion
14 under Rule 803(6), as a business record for all purposes.

15 Again, we have our limited purpose argument as an
16 alternative, but I think I've outlined what that is.

17 Finally, Your Honor, just to show you again what it is
18 we're disputing here. I'll give just a few examples, if I may.
19 In the trial, I showed Barclays' accountant, Gary Romain, a
20 document. And I'd just like to show briefly, if I could, the
21 testimony at page 63, line 15, 65/8. This related to the issue
22 of the valuation date -- sorry, the trial transcript is
23 September 2nd. Page 63, beginning line 15.

24 I asked him to turn to tab 17 which is BCI Exhibit
25 870A. Right above here I asked him to look at 870A. So that's

1 the BCI exhibit I'm asking him to look at. And that remains
2 one that -- for dispute. And I asked him to direct his
3 attention to the indented text, to read it.

4 Let's go to the next page. If we could go down to the
5 whole page. Go ahead and highlight the whole page, just bring
6 it up. This is where PwC says -- and I'm reading from the
7 document, "Given the turmoil in the markets, there was further
8 downward pressure on prices on the weekend, 9/20 and 9/21, and
9 therefore," I'm quoting the document, "we," that's PwC,
10 "suggested that this may be something that you would want to
11 capture. Do you see that?

12 "A. I do."

13 And I say, "In reading that, and looking more closely,
14 I realize I think I misdescribed the e-mail. It was sent by
15 Robert MacGoey of PwC." So I clear that up. And I then ask, in
16 the question -- can we go down to the next page, "Is this
17 consistent with your recollection and understanding that PwC
18 suggested that you use 9/22 prices rather than 9/19?

19 "A. Yes, it is.

20 "Q. And is that what you did?

21 "A. Yes, it is.

22 "Q. And did PwC agree with that as a reasonable approach?

23 "A. Yes, they did."

24 So the point of all this, Your Honor, is simply to
25 remind the Court when I tried to show that document, tried to

1 move it into evidence, I believe at that time. And there was
2 as hearsay objection. You did sustain that hearsay objection.
3 And I said we can come back to that.

4 But if I could show the document now, BCI Exhibit --
5 actually, what I'd like to show on that document is Movants'
6 Exhibit 813. Your Honor, this is the same exact document,
7 perhaps in a slightly different form. But it's -- can you blow
8 it up? The language down here, just blow up all of it. It
9 would be, "Given the turmoil in the markets and the further
10 downward pressures on prices" -- I think you need to blow up
11 the whole thing. And it says, "And therefore we suggest that
12 this may be something you would want to capture."

13 So the point, Your Honor, is Movants' 813 is, in
14 substance, anyway -- there may be a slightly different way in
15 which it's produced -- the exact same e-mail memo from PwC's
16 Robert MccGoey, one of the lead auditors on the case, to Sean
17 Teague of Barclays. It's the exact same information that was
18 BCI 870 -- or 870A, we created a more readable version. Here
19 it is. The exact same memo.

20 Now, movants have made it an exhibit. It is has not
21 been admitted into evidence, but I'm sure we didn't object. If
22 we did it would have been a clerical error. We are not
23 objecting. We want it into evidence. They designated it. We
24 designated it. We believe it should come into evidence. It is
25 clear black-letter law under the Second Circuit that e-mails

1 conducted -- produced in the regular course of business are
2 business records. I say under the Second Circuit -- I have at
3 least the Southern District of New York case, United States v.
4 Stein, 2007 WL 3009650 -- that holds that; that if the e-mail
5 otherwise satisfies the business record requirement of being
6 part of the regular course of business, reporting regularly-
7 conducted activity in which it's the practice to make a written
8 record, it's a business record. And this is a memo. This is
9 simply a memo to Sean Teague from PwC laying out the analysis
10 PwC had of this valuation date issue.

11 So part of the reason for showing that, Your Honor, is
12 to show you that an example of an important document we think
13 should come into evidence as a business record; also, to remind
14 the Court that there are numerous PwC documents that movants
15 have identified, most of which are already in evidence -- this
16 one isn't -- that are indistinguishable from the documents we
17 seek to get into evidence. And as you heard me say the other
18 day, we think it is at least unfair for that to be the result,
19 and must indicate if they proffered it as admissible evidence,
20 that they believe these PwC documents are business records and
21 therefore not subject to hearsay and admissible.

22 Now, if I might, Your Honor, just show a few more
23 examples. You did obviously hear the last few days from
24 Professor Pfleiderer who reviewed extensively the PwC work.
25 And if we could show demonstrative slide 47, this is an example

1 of when he presented his testimony, some of the PwC work he
2 quoted. And this related to this Pine asset that's been
3 heavily disputed in terms of its valuation.

4 And Professor Pfleiderer looked at all sorts of things
5 with respect to Pine. He looked at the Barclays internal
6 analysis and valuation; he looked at PwC's analysis; he looked
7 at the Gifford Fong valuation from JPMorgan, the examiner
8 report, et cetera. But here, he's citing to the fact that
9 PwC's valuation included the Barclays discounts for
10 participation in funding risk were not unreasonable. So there
11 you see Professor Pfleiderer, in the demonstrative, referencing
12 that as one of the relevant data points he relied upon.

13 Of course, he can rely on inadmissible evidence to
14 give an expert opinion. That's clear from the rule itself.
15 702, I believe, says that. But we also think it helps show the
16 relevance of this document and why it should be admitted. If
17 we can have a look at BCI Exhibit 607, it's one of the
18 documents in dispute today. And here it is. It's clearly a
19 business record. It's an internal memorandum to the BarCap
20 audit file. I mean, this is, by definition, a memo for the
21 file, for the record: PwC Financial Analytics and Valuation
22 Group. It's from a formal group: February 8, 2009 review of
23 Lehman CDO acquisition valuation; prepared at the time, in the
24 regular course of business, where it would be normal practice
25 to make such a memo to the file. Of course, we offered to

1 bring a custodian if we have to to address that, but I don't
2 think that's really the issue.

3 This, then has an extensive review of the CDO
4 valuations. If we can go to page 11, you see the significant
5 discussion of the Pine CLO that begins on that page. And it
6 goes down for all of page 11, all of page 12, and they
7 review -- if we could just go back up to 11 for a moment --
8 they review first the front office valuation approach. Those
9 are the traders. The valuation approach that ultimately, I
10 think, determined what Barclays booked for Pine, because it was
11 a PMTG asset. And they run down and summarize that approach.

12 And you go to page 12. After reviewing that approach
13 they look at the PCG price. There was analysis done by the
14 internal product control group. PwC reviews that. Then PwC
15 sets forth the FA&V assessment, which I believe, if we go back
16 to the first page, is the group that -- the PwC internal group,
17 the financial analytics and valuation group. So they set
18 forth -- there we go -- financial analytics and valuation
19 group. So they then set forth their analysis on page 12
20 through to page 13.

21 And if we could go to page 13, you'll see their
22 extensive analysis. And then this concluding -- if we could
23 just blow up the conclusion paragraph? Could we blow that up?
24 And it says, "While we," this is a PwC memo of course. "While
25 we derive a lower starting price for the underlying collateral

1 than was seen by the client, the twenty percent participation
2 risk discount, which partially accounts for the collateral and
3 the conservative approach in weighting the potential funding
4 obligations, drives the client price to a level that does not
5 appear unreasonable." It goes on to further explain its
6 conclusions.

7 This is contemporaneous evidence of PwC's assessment
8 in a nonlitigation environment of the valuation work done by
9 Barclays. It's clearly part of a regular business memo. And
10 the balance of legal authority would say that should come in.

11 I have a few other examples, Your Honor, but I've gone
12 on for a while. Why don't I just, if I could, briefly show you
13 again some of what movants have identified that is in evidence.
14 Movants' 255 is a similar memo to the one we just saw to the
15 Barclays Capital PC audit team from one of the people involved
16 in the audit. Review of Barclays Capital price testing. Same
17 kind of business memo. We looked at this, I think the other
18 day.

19 This one appears to preempt what maybe I think is a
20 nonissue, but if you could look at the Bates number, this one
21 has WP. Some of -- Mr. Gaffey noted the other day that some of
22 these documents are Bates numbered WP, some are not -- work
23 papers. There's some internal distinction at PwC that I don't
24 fully understand -- I'll confess -- between work papers and
25 non-work papers. I do not think it can be used as a proxy to

1 what is or is not a business record.

2 Some of what movants designated are WP, some of what
3 they designated does not have a WP in the Bates stamp. Some of
4 what we designated has WP in the Bates stamp, some does not.
5 The point is, a memo like this clearly, on its face, is formed
6 in the regular course of business and it would be the regular
7 practice for it to be prepared.

8 Let's go to Movants' 332. Another PwC -- this is now
9 an internal e-mail of PwC from one of the lead audit partners
10 John Holloway to Mr. Guarnuccio, Mr. MacGoey, other auditors,
11 addressing some issues involving the acquisition balance sheet:
12 "Can someone at your end please go through the agreement and
13 letter and understand whether the JPM assets are in any way
14 covered." This is asking questions about the December
15 settlement inventory. And this obviously, on its face, may
16 raise a little more of a question as to whether it's a business
17 record. But it is an e-mail sent internally by PwC people in
18 their regular course of business. And I don't think it's a
19 stretch for us all to say I'm sure in the regular course of
20 business they sent e-mails about what they're doing on the
21 audit. So we didn't object.

22 They think it's helpful to them. I don't think it is.
23 But it doesn't matter. It is a business a record. And let's
24 look at the Bates number. There's no WP. So there's no magic
25 to WP based on the movants' designations, and we don't think

1 there's any magic to it either.

2 Again, I have a couple of other examples, but I don't
3 want to go on too long. I would note for the record -- we
4 could pull this up, but I don't think it's necessary -- that we
5 have had extensive discussion about these PwC documents for
6 many, many weeks. And we did have, about a month ago,
7 essentially a deal in which there were three e-mails that the
8 movants wanted in that related to Mr. Guarnuccio's
9 interpretation of whether the two billion dollar estimate for
10 comp covered only bonuses or bonus and salaries. You've heard
11 testimony from Mr. Exall on that issue. We did resist those at
12 first. And we were then engaged in discussion with movants:
13 if we agreed to those three, would they agree to, I think it
14 was five or six PwC documents that we wanted in.

15 And I think we had an in-principle agreement on that
16 until we then said, well actually we want more -- we want more
17 PwC documents. And then they said well, no, no deal. I'm not
18 accusing anyone of bad faith for them saying -- yanking the
19 deal. The deal did change. But my point is, I don't think
20 what's really happening here, Your Honor, is an argument that
21 what they wanted in was admissible, what we wanted in is not
22 admissible. I think the argument is, they just want to keep
23 out a lot of evidence that they think is unhelpful to them.

24 They've raised the 702 argument for the first time --
25 I believe for the first time -- last week. That's fine.

1 That's when the issue was joined. But it didn't come up for
2 the many weeks and months when they were designating some of
3 them and we were designating some of them.

4 Your Honor, I think unless you have any questions, I
5 think that we'll allow the movants to respond.

6 THE COURT: Okay. Thank you.

7 MR. GAFFEY: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MR. GAFFEY: For the record, Robert Gaffey from Jones
10 Day for the debtors. Let me deal first with a couple of things
11 that Mr. Hume raised at the end of his argument, one of which
12 goes to the overall questions.

13 It is a fact that, as I said when we discussed this
14 last time, that from time to time we have done what litigators
15 do and said all right, if you'll let that document in, I'll let
16 this document in. That really is not the issue here today.
17 The issue here today is whether or not Barclays should be
18 permitted to put in a raft of PwC documents which taken all
19 together, I believe, is a substitute for expert testimony.

20 And I'll give you an example of the narrow versus the
21 broad here. Exhibit 870, that's Barclays' Exhibit 870 on which
22 Mr. Hume spent a little time here, which he described at M-815,
23 and makes the argument well, we put the same document in. He's
24 absolutely right. That's why I have no objection to it. On
25 the list of objections that we have attached to our letter, we

1 have no objection to Barclays Exhibit 870, which is identical
2 to 813 (sic). So I agree with him. You know, we put it in;
3 we're certainly not going to take a position that if they want
4 to give it another number too, that's fine with us.

5 The fact of the matter, though, is the documents that
6 come in from our side of the aisle often could be -- most of
7 them come in with no objection. Had there been an objection,
8 the argument would have been to I think all of them, there are
9 admissions in those documents. That's not a hearsay issue.
10 And that's what brings us here.

11 With regard to the suggestion that it ought to be a
12 simple formula of if the movants put into evidence a document
13 from PwC then all bets are off and all PwC documents should go
14 in, then that would simply swallow the rules of evidence. I
15 mean, if that were so, then -- and if the end result were,
16 well, because there are some documents that emanated from PwC
17 in the record at the behest of movants, all PwC documents have
18 to come in, then we would want the ones that we still haven't
19 managed to make an agreement about, including the famous Mr.
20 Guarnuccio e-mail about the two billion dollars in the comp
21 piece. But that's really not what's at issue here.

22 What's at issue here -- and I think it does go
23 directly to the heart of the interplay between the hearsay rule
24 and Rule 701 and 702 -- is taken as a whole, I think it's
25 evident, and I think it's more evident now than it was when we

1 last addressed this, given the fact that Professor Pfleiderer
2 has now testified, that this is an effort by Barclays to
3 construct from a hearsay document what amounts to a second
4 expert who actually will address the depth and extent and
5 nature and expertise required to explain whatever it was that
6 PwC did in the context of its overall audit of Barclays that
7 addressed the values at issues here.

8 And just to frame it that way, I think, demonstrates
9 the point. Your Honor heard Professor Pfleiderer say multiple
10 times, he's not an accountant. We know he's not an accountant.
11 That really wasn't a matter in any dispute. His testimony
12 repeatedly refers to -- there's an add-on at the end -- and PwC
13 reviewed this; and PwC reviewed this. And to him, he suggested
14 that the fact of the PwC review, the PwC audit, which he
15 occasionally mis-described as the PwC valuation, enhances his
16 opinion -- which is also not a valuation -- but his opinion
17 that the activities of the PCG group and the others within
18 Barclays who conducted internal valuations, was reasonable.

19 Now, his opinion is what it is, and it has the weight
20 that it has or it doesn't have. And we'll address that in the
21 longer term. But to say that because a document was generated
22 by an accountant in or out of a litigation context, and the
23 accountant has expertise, and the accountant expresses an
24 opinion, and the accountant prepares that type of document in
25 the normal course of business; and to say that those factors

1 standing alone are enough to justify its admission into
2 evidence, is to take Rule 803 and use it to make Rule 702
3 disappear.

4 Now, the cases that have addressed this tension
5 between the two -- and one that we cite in our litter is the
6 Applin decision, which is a good discussion -- demonstrate that
7 the hearsay rule is not a cure-all -- the business records
8 exception to the hearsay rule is not a cure-all to the 702
9 problem that opinion evidence creates. Applin suggests and
10 looks a bit at the history of the rule and explains that the
11 reason for the inclusion of opinions in the business records
12 rule is really something that's directed to something much more
13 mundane than this. That's getting medical records in in
14 personal injury cases. The doctor examined and the doctor
15 found this injury.

16 Now, that's something that might have independent
17 weight, and therefore can come in. That's just not true of the
18 body of documents that we have here. They are replete with
19 PricewaterhouseCoopers' conclusions or opinions as to the
20 nature of the values or as to the nature of the work that
21 Barclays did. I won't belabor this, because I said most of
22 what I had to say about the topic when we last addressed this.

23 I think that our letter adds case law that supports
24 our position here, the so-called paper expert position. How --

25 THE COURT: Can I break in and ask a question that's

1 bothering me? I don't mean to intrude on the flow of your
2 words. But Rule 702 is entitled "Testimony by experts" and
3 Rule 803(6) is entitled "Records of regularly conducted
4 activity." So I have a very simplistic issue of conflation.

5 How do we meld, for purposes of your argument, a rule
6 of evidence which is about testimony with a rule of evidence
7 which is about documents, records, without the imagery of the
8 paper expert, which is your metaphor, but there's no metaphor
9 in the rules; there's only a metaphor in your argument?

10 MR. GAFFEY: I think the answer to that, Your Honor,
11 is twofold. One, evidence is evidence. It's an issue of
12 weight. A document comes into evidence as a document.
13 Testimony comes in as testimony. But evidence is evidence.
14 That's the first piece.

15 The second piece is, what's the purpose -- the best
16 analogy -- not to use a metaphor -- but the best analogy under
17 Rule 803 is the double hearsay issue which is familiar to
18 everybody in this courtroom. A business record in writing will
19 contain -- contains some -- let me start again. A business
20 record in writing can contain double hearsay. The rules
21 expressly address that by saying in Rule 805, each level of the
22 chain of hearsay needs to be addressed.

23 The analysis on the question Your Honor presents is no
24 different. Rule 803 -- the business records exception gets you
25 past the first evidentiary obstacle to the proponent of the

1 document: this is hearsay; we'll agree it's hearsay. The
2 proponent is able to say this was prepared in the normal course
3 of business and it was the normal course of business to prepare
4 such a document. That gets you past the hearsay issue as to
5 the document as a whole.

6 But within the document -- and now go back to my
7 analogy -- whether it's a second level hearsay problem or Rule
8 702 opinion problem, the proponent of the document still has to
9 overcome that second hurdle. And that goes back to: evidence
10 is evidence.

11 The statements of the absent declarant that constitute
12 the hearsay in the analogy, or the statements that are the
13 expert opinion, to put it right at the foot of Rule 702,
14 whether they come in from the stand or come in from the
15 document, are evidence. The reason 702 and the reason the
16 paper expert issue is here, goes to what the rules do require
17 of expert testimony. Expert testimony is entitled to be
18 cross-examined. Expert evidence, whether it be testimony or
19 whether it be a report or whether it be the documents upon
20 which the expert relied, are required to be produced. Now,
21 that issue has been a bit lost in the shuffle here.

22 The PwC issue has arisen very recently in the life of
23 this case. It didn't arise during the discovery period.
24 PricewaterhouseCoopers was never identified as an expert.
25 PricewaterhouseCoopers was never put on Barclays' witness list.

1 My own view is that's a strategic decision. They're entitled
2 to make it, but I think that's what it is. And then at the end
3 of the trial to say, well, let's put this in to bolster the
4 testimony of the expert who is there on the stand but can't be
5 cross examined about the substance of the
6 PricewaterhouseCoopers issue, demonstrates the real -- one of
7 the real problems with the tensions here.

8 One of the cases that we cite addresses this issue,
9 and that's the Martin Smoke case, which talks about not only
10 the 702 issue, but addresses expressly that the proponent of
11 the document there, as Barclays I think is doing here, offered
12 it at a point where the author of the ultimately inadmissible
13 statement was clearly for opinion purposes, had never been
14 cross examined, and it was an evasion of the Rule 26
15 requirements regarding expert disclosures.

16 Now, those Rule 26 requirements applied in this case.
17 As Your Honor knows, there was a lot of back-and-forth about
18 how to manage the expert case: when they were going to be
19 identified; when the reports were going to be produced.
20 There's an inherent unfairness in simply because -- it's almost
21 circular to say well, we're not putting the expert on the stand
22 so it's okay to put their opinions in by another mechanism;
23 evidence is evidence.

24 And what the Rule 26 requirements, what the expert
25 disclosure requirements obtain to is the fairness that's -- the

1 necessary elements of being able to examine the basis for the
2 expert's opinion, depose the expert, put up a rebuttal report.
3 We had none of those opportunities here. If those documents
4 come into evidence now, under the guise of they're a business
5 record and because an accountant wrote them down as they
6 normally do -- and that's all I hear Mr. Hume really said about
7 why they're admissible -- then an essentially expert opinion
8 will have been put into the record of the case without an
9 opportunity to cross examine, by whatever mechanism they choose
10 to introduce it, be it by documents or be it by testimony.

11 THE COURT: Is it an expert opinion or is it an
12 inference that a finder of fact can make as a result of
13 reviewing the business records?

14 MR. GAFFEY: If I understand Your Honor --

15 THE COURT: Because what is the opinion that you're
16 complaining about?

17 MR. GAFFEY: I'll give you an example by reference to
18 one of the documents. Let's take -- Steve could you put BCI
19 Exhibit 607 up on the screen, please?

20 Now, this document is a memorandum, as Mr. Hume notes
21 when he talks about it. It's not denominated by Barclays as --
22 by PricewaterhouseCoopers as work papers. And again, that's
23 the distinction -- I spent all the time on that I want to
24 spend. It's a memo -- PricewaterhouseCoopers'. I understand
25 that.

1 But if Your Honor would take a look, for example, at
2 page 2 of that document -- and I'll highlight this piece -- and
3 this is an example of something I think all of these documents
4 are replete with -- take paragraph 1(a) the reasonableness of
5 using 9/30 marks as of 9/22/08. Well, as Your Honor knows,
6 that's -- when an expert is on the stand, they talk about this
7 issue and they're able to be cross examined about it. And the
8 PwC document recounts what they've done to address this issue,
9 or at least adverse to it, and among other things, refers to,
10 "Based on discussions with market participants and observations
11 of deals." That's the hearsay problem.

12 And then go to the last paragraph -- the last
13 sentence, "Therefore the September month-end mark should fall
14 within a reasonable range of the acquisition date's fair value,
15 especially considering the wide bid-ask range for CDOs."
16 That's what would come out of the mouth of an expert witness if
17 an expert took the stand. That is the type of testimony that
18 Professor Pfleiderer was put on the stand to give. What was
19 the reasonableness of this approach; what was the
20 reasonableness of that approach? Was the methodology used such
21 that X conclusion or Y conclusion is reasonable? That's an
22 opinion.

23 Now, the difference is, as Mr. Hume says, this is not
24 an opinion expressed in the context of an expert report. It's
25 not an opinion elicited for the purpose of litigation.

1 Now, I heard Professor Pfleiderer testify yesterday,
2 when he gave his view, ironically from the witness stand, that
3 litigation experts' testimony should be given less weight
4 than -- my term -- real time experts. And that was prob -- I
5 suspect that's a precursor to the argument that we're hearing
6 today, which is, well, this was done at a different time and at
7 a different place. It doesn't make it any less of an expert
8 opinion that's entitled to be cross examined, that's entitled
9 to be probed for what its basis is.

10 If this document comes in, it will come in only with
11 what Pricewaterhouse chose to record in a memorandum that
12 summarizes its activities and the conclusion that it makes.
13 That type of format continues throughout these documents.

14 I'll give the Court another example. There's a
15 particular format I want to find, Your Honor. Excuse me one
16 moment.

17 (Pause)

18 MR. GAFFEY: Well, I won't take the time with it, Your
19 Honor. I think even within 607 -- let me turn to another page
20 of that-- take a look at page 5 of that. Steve, would you put
21 that on the screen, please?

22 Regarding certain bid-ask adjustments. The document
23 recites at the top, in hearsay, that the client -- you don't
24 know who within the client -- "The client has applied an on-top
25 bid-ask adjustment to all the Lehman CDO desk acquisition

1 prices. Based on discussions with the front office," we're not
2 sure who the front office is, the author of this document
3 continues to talk about this bid-ask adjustment. And then
4 concludes, beginning "Therefore", "Therefore we recommend that
5 the new bid-ask adjustment be taken on the 9/22 acquisition
6 prices for the CDO assets acquired from Lehman."

7 Now, that is an opinion. This is distinct, Your
8 Honor, from the smaller fact that this documents might prove.
9 The smaller fact that these documents might prove is
10 Pricewaterhouse was asked to review some things here. It did.
11 Now, Professor Pfleiderer's opinion essentially relies on the
12 fact of PwC review. If the Court were to take these for that
13 limited purpose, okay. But if what Barclays wants to do is to
14 put these documents in so that these opinions stated by the
15 absent declarant, PwC, have any weight as to the correctness of
16 what it is they say, then that's where the rubber hits the road
17 on the 702 and the hearsay problem; that's where it becomes the
18 so-called paper expert. And I can't cross examine that
19 document. I can't cross examine the author of it; was not
20 given an opportunity to do that during discovery.

21 I'm not sure if that addresses Your Honor's question.
22 I think it does, or at least --

23 THE COURT: Well, it's certain responsive
24 thematically. But it doesn't -- it doesn't entirely deal with
25 what to me is a fundamental problem in your argument. And I

1 understand what you're trying to accomplish here. And it's a
2 fascinating issue. Even Mr. Hume suggested it was an
3 interesting argument.

4 What I'm troubled by is trying to marry, for purposes
5 of this particular case, rules of evidence in a manner that
6 produces the fairest possible record for both parties and
7 enables the Court to fairly assess trustworthy evidence in the
8 case. And the fundamental premise of the Federal Rules of
9 Evidence, particularly the hearsay rule and the exceptions to
10 that rule, involve fairness.

11 Rule 102 -- and we're all familiar with Rule 102 -- is
12 like Section 105 for purposes of bankruptcy practitioners.
13 It's a catchall. "These rules shall be construed to secure
14 fairness in administration, elimination of unjustifiable
15 expense and delay, and promotion of growth and development of
16 the law of evidence to the end that the truth may be
17 ascertained and proceedings justly determined."

18 With those high aspirations in mind, I largely do not
19 have a problem with seeing all these documents. And the only
20 real issue in my mind is whether or not my seeing these
21 documents and considering these documents exposes the movants
22 to demonstrable prejudice.

23 Your argument is that you can't cross examine the
24 opinion statements that are embedded in many of these
25 documents. But these opinion statements are statements that

1 were made not for purposes of this litigation, but for purposes
2 of PwC's audit, which as we know from the evidence presented so
3 far in the case, was conducted not solely for purposes of
4 testing the reasonableness of the acquisition balance sheet,
5 but for purposes of auditing the financial statements of
6 Barclays in all respects. This was obviously an important
7 feature of that exercise.

8 I don't view any of these embedded opinions -- and
9 using this document which is on the screen as an example of
10 that -- as going to an ultimate issue in dispute in this
11 litigation. Rather I view those little micro-opinions as
12 indicia of the work that was done by those people who had
13 undertaken the audit function for PwC at the time that these
14 documents were being prepared; and to that extent, goes to the
15 nature of their activities and the kinds of mental impressions
16 they formed during the course of their work.

17 And so one of my fundamental questions here is how
18 this hurts you. Because to the extent that prejudice is one of
19 the things I'm concerned about in weighing this nuance question
20 of evidence, I don't see how you're hurt, because I've already,
21 by virtue of the argument, seen the opinions.

22 MR. GAFFEY: And on exactly that note, Your Honor, let
23 me make a small concession and let me respond to the rest of
24 that. Here's the small concession. This is a bench trial.
25 Were this a jury trial, I'd be fighting a lot harder about

1 these documents for exactly that reason. We'd be doing the
2 usual: get it off the screen, they can't see it till it's in.
3 And there would be no issue with regard to whether the Court
4 saw it, because it's only going to make an evidentiary issue.

5 I know the Court sees it. I also know that if it
6 comes in, a Court is able to make some distinctions, at least
7 from a weight perspective, between hearsay and nonhearsay. So
8 that's the small concession, with regard to what's the
9 prejudice. We have less prejudice here than we would have in a
10 jury trial for all the reasons everybody in this courtroom
11 knows.

12 On the fairness issue, though -- on the fairness
13 issue, I think we do have a legitimate gripe. I think the
14 fairness issue does arise from the timing. Now, I said, when
15 we spoke about this the other day, that's not the core of our
16 argument. Our argument is based on the Rule of Evidence and
17 what's admissible and what's not.

18 This comes up at the end. No hint of this during
19 discovery; no identification of PwC's -- the use of PwC
20 document for opinion purposes. And I'm phrasing it that way so
21 I'm not going to characterize it as expert evidence. Except,
22 that's exactly what it is. That's where the unfairness is.
23 Whatever weight the Court gives it or doesn't give it, in a
24 much more educated way than a juror could, I still didn't get a
25 shot during discovery at PwC qua expert. I never got a report

1 from PwC qua expert.

2 Your Honor mentioned little micro-opinions. There's a
3 lot of them. And they're by a variety of PwC people. And when
4 you put them all together, here it comes again, it's the paper
5 expert. It's the sum total of the collection of the documents.
6 And I think to put them in in-whole, for what they now purport
7 to be, the opinions of PricewaterhouseCoopers, coupled with the
8 timing, the failure to identify them, no report and therefore
9 no follow-up expert discovery, does create prejudice for the
10 movants.

11 I take Your Honor's point about less prejudice than if
12 we had a jury trial. But there is prejudice nonetheless.

13 THE COURT: Okay.

14 MR. GAFFEY: Thank you, Your Honor.

15 MR. HUME: May I very briefly respond, Your Honor?

16 THE COURT: Sure.

17 MR. HUME: I think the first part I'd like to do is
18 address this prejudice argument, something I meant to say at
19 the beginning.

20 Your Honor may recall that after the Rule 60 motions
21 were filed on September 15, 2009, Mr. Schiller sent a letter to
22 the Court relating to scheduling, that we didn't know exactly
23 how to posture this entire proceeding. But in the course of
24 that letter, Your Honor may also recall, we set forth some
25 initial reactions to what the movants were saying.

1 And in the course of doing so, when we addressed the
2 repo collateral -- actually could you go up to the text so we
3 can see the context of this -- it's in the paragraph -- no, no,
4 no. You should be on page 3, last paragraph. And addressed
5 this assertion it was the discounted repo collateral that it
6 must have been five billion more, then at forty-five. And we
7 explain that the nominal value of the securities were somewhere
8 in the region of that. That was in the Leventhal declaration
9 that was in the December settlement, where we say that the
10 actual value was potentially far less. And then we footnote
11 down -- footnote 3 now to the valuation -- and we then said,
12 "Our doubts about the value at the time were justified.
13 Applying a standard valuation policy, it took Barclays months
14 to determine the correct value of what it received. Based upon
15 that process, which was done in the ordinary course and was
16 subject to review by independent auditors, it was not for any
17 litigation purposes." And we go on to say what we concluded:
18 It was worth billions of dollars less than the Lehman and BONY
19 mark.

20 September 24, 2009 we raised the issue of our
21 independent auditors. It was raised again in Professor
22 Pfleiderer's report of January 8, 2010. He relied extensively
23 on PwC. Movants subpoenaed PwC -- I don't know the exact date,
24 but they subpoenaed them during discovery. That's the reason
25 the documents were produced. And, Your Honor, as the Court

1 said the other day, the Court will form its own impressions of
2 various judgments that have been made. But I cannot let stand
3 the suggestion by Mr. Gaffey that it's our strategic choice not
4 to bring PwC.

5 At least to our way of thinking, Your Honor, when
6 somebody accuses a public company that files a public financial
7 statement with the SEC and the FSA on this multibillion dollar
8 transaction -- accuses us of understating the values by five
9 billion, isn't it up to them to prove it? They chose not to
10 depose PwC. Now they want to keep the PwC documents out, and
11 they claim it's new -- not new. They're the ones who raised
12 the issue. Your valuations are all wrong. And you were
13 audited. Here are the documents. They don't want to depose
14 them? They didn't want to call those valuation professionals
15 from the PCG group. So respectfully, Your Honor, we submit the
16 strategy here, the tactical judgments are on this side of the
17 courtroom, not this side.

18 Finally, Your Honor, just two brief things. Your
19 Honor's question about testimony -- the word "testimony" in
20 Rule 702, versus "records" in 803(6). It occurred to me and I
21 think this is exactly the point I was trying to make in a
22 better, more acute or precise way, that 702 is talking about
23 what happens in a litigation. One party says, I need an
24 expert. He's going to come and testify. When it's in a
25 context of litigation, those rules of 702 and the Daubert

1 standards apply. If it's not, if it's before litigation, and
2 someone makes a record, that's just a fact. It's just a fact.

3 In fact, if PwC had been called, it would never have
4 occurred to me to say that they're being qualified as an
5 expert. They would have been a fact witness: What did you do?
6 What did you find? What procedures did you follow?

7 If they had called PwC, we wouldn't have said, that's
8 an expert. We just said, it. They did have PwC people on
9 their fact witness list. Then they struck them. I never
10 thought that they were expert witnesses. None of this ever
11 occurred to us until we raised it the other day.

12 So they are fact witnesses. It is a fact what
13 happened. They made records of what happened. It should come
14 in as factual record evidence. That's it.

15 803(6) -- the drafters of the Federal Rules of
16 Evidence know how to make one rule subject to another. They
17 know how to say "subject to the provisions of 702". They did
18 not write it that way. There is a strong inference on the
19 plain text therefore. It is not read that way. And it's never
20 been read that way.

21 Auditor records come in as business records in case
22 after case after case. It would be extremely unusual in a case
23 of this magnitude for the rule to be different.

24 And finally, Your Honor, back to your citation to Rule
25 102, I would just note for the record that the Second Circuit,

1 in interpreting 803(6), says that it "favors the admission of
2 evidence rather than its exclusion, if it has any probative
3 value at all." That's United States v. Williams, 205 F.3d 23,
4 34, a Second Circuit decision from 2000. I think, in other
5 words, a close call, in light of what the Second Circuit has
6 said about 803(6), what Rule 102 says, any close call favors
7 admission.

8 With respect to hearsay within hearsay, Your Honor, we
9 asked them a couple of weeks ago to identify with specificity
10 which ones they meant. They didn't. We said -- we gave a few
11 examples. We didn't -- they now say, well, we don't identify
12 with specificity which ones should come in. Well, it's up to
13 them to say what the hearsay within the hearsay problem is.
14 They've had several weeks to do so, and they haven't.

15 So again, we submit these should come in as business
16 records. And Your Honor has heard our alternative limited
17 purpose argument, so I don't think I need to repeat that.
18 Thank you.

19 THE COURT: Okay. I'm going to take a ten minute --
20 do you want to respond, Mr. Gaffey?

21 MR. GAFFEY: You know, there's something I meant to
22 clarify, Your Honor, that if you don't mind, I think makes some
23 sense for me to raise before Your Honor deliberates on this.

24 The 702 -- I just want to be clear that the 702 aspect
25 of our objections does not apply to every one of the documents.

1 There are some -- and I can identify for the record -- but
2 they're on the list attached to our letter -- there are some
3 where our objection is only hearsay. So I just wanted to be
4 clear about that so I'm not thought to be overstating my case.
5 Most of them do have the 702 issue. But some do not.

6 THE COURT: Okay. I appreciate that clarification.
7 We're going to take a ten-minute break. I'd like to think
8 about this a little.

9 THE CLERK: All rise.

10 (Recess from 11:16 a.m. to 11:31 a.m.0

11 THE COURT: Please be seated.

12 I've given some additional thought to the issue of the
13 PricewaterhouseCoopers exhibits that are all collected in a
14 binder. This issue really first surfaced and was argued in a
15 preliminary way before the submission of letter briefs. I have
16 a letter brief from Boies Schiller dated October 4, and a
17 responsive letter brief from Jones Day dated October 6.
18 Additionally, we had a very interesting and specific argument
19 this morning which included references to sample documents and
20 the contents of those documents.

21 The question presented is an interesting one. And I
22 think that the colloquy probably highlights my thinking on the
23 point. I don't believe that the documents that are the subject
24 of this motion by Barclays to admit into evidence certain
25 documents from PricewaterhouseCoopers, actually implicates Rule

1 702 at all. I understand the concern expressed by Mr. Gaffey
2 and the reference made by him to the so-called paper expert.
3 But I actually believe that the documents, taken as a whole, do
4 not constitute expert opinion evidence at all. There are
5 multiple reasons for that conclusion on my part.

6 First, I believe that the documents, fairly read,
7 constitute work papers that PricewaterhouseCoopers prepared in
8 the course of their audit of Barclays' financial statements,
9 and in particular, provide information concerning judgments
10 made by the auditors as to the proper way to account for assets
11 acquired from Lehman Brothers that are referenced in the so-
12 called acquisition balance sheet of Barclays.

13 To the extent that there are what I characterized as
14 micro-opinions of PwC employees that are embedded in these
15 documents, these are simply ordinary-course judgments made by
16 professionals in the course of their work. And I do not view
17 these opinions as going to the fundamental question before the
18 Court. None of these opinions, either individually or
19 collectively, express an opinion as to the fair value, really,
20 of the acquired assets. I view these documents as going to the
21 process and procedure, rather than to the ultimate question
22 which is in dispute in the case.

23 Also I take Mr. Hume's point that at least for
24 purposes of trial preparation, Barclays always assumed, I think
25 correctly, that any witness that might be presented from PwC

1 would be a fact witness and not an expert witness, a witness
2 who would be questioned if called to testify as to the work
3 that was performed. And necessarily, an auditor's work
4 includes the exercise of judgment. And the exercise of
5 judgment necessarily involves forming certain opinions.

6 I also agree that Rule 702, by virtue of its title,
7 deals with testimony by experts and in particular parties who
8 are engaged to provide expert testimony at a trial.

9 The hearsay issue presented by Jones Day is a
10 different story, however. I agree with Mr. Gaffey that to the
11 extent that there are hearsay problems embedded in these
12 business records, the hearsay within hearsay rule, Rule 805,
13 applies. And for purposes of judicial review of these
14 documents, I will not give any weight whatsoever or treat as
15 competent evidence statements recorded within these documents
16 that constitute hearsay and that do not otherwise correspond
17 with a recognized exception to the hearsay rule.

18 That leads to the question of what am I going to do
19 with these documents and what's the real purpose of their being
20 admitted. And I am going to admit them. And in a sense, this
21 is a halfway house between admitting the documents for all
22 purposes and admitting the documents for the special purposes
23 proposed by Boies Schiller in its fall-back position in its
24 letter brief.

25 My view of these documents is that they do not

1 constitute a paper trail that can be fairly read as an opinion
2 as to the value of the portfolio of financial assets acquired
3 by Barclays from Lehman Brothers, but that they do reflect
4 contemporaneous evidence of the process undertaken by
5 professionals to test the reasonableness of judgments made by
6 Barclays' personnel in their best effort undertaken to value
7 these assets. The valuation is a Barclays valuation which has
8 been tested, at least as to process and procedure, by
9 PricewaterhouseCoopers during the ordinary course of its audit.

10 That does not mean that Pricewaterhouse has provided a
11 valuation opinion. But I do accept the fact that because an
12 audit was conducted, that the judgments made by Barclays
13 internally had at least been scrutinized. And to that extent,
14 there may be greater reliability than if they hadn't been
15 scrutinized. It's in effect a statement by the Court that's
16 somewhat consistent with what Professor Pfleiderer said for two
17 days.

18 So the documents are admitted for the purposes of
19 demonstrating that an audit was conducted, and that the audit
20 included some review and testing of judgments made by Barclays
21 personnel of the Barclays valuation. To the extent that there
22 is hearsay within hearsay, I will disregard such hearsay
23 statements. Now we need to have a chambers conference.

24 MR. GAFFEY: Your Honor, before we do that, I think I
25 have an agreement -- in anticipating of Your Honor's decision,

1 there were two PricewaterhouseCoopers documents that movants
2 wanted in to which Barclays had objected. And I think we have
3 an agreement now that they're waiving their objection. And I'd
4 offer them into evidence now. And they are --

5 THE COURT: So that's the good part of this ruling for
6 you.

7 MR. GAFFEY: There's always a little sunlight at the
8 end of the day, Your Honor.

9 THE COURT: I'm glad you can find it.

10 MR. GAFFEY: The other point I want to raise might not
11 be so agreeable. Those are Exhibits M-150 and Exhibit M-335.
12 I'm happy to describe them for the record, Your Honor, but I
13 think they were already described in the pertinent portions of
14 the transcript.

15 THE COURT: All right. They're admitted.
16 (PwC Document was hereby received in evidence as Movants'
17 Exhibit M-150, as of this date.)

18 (PwC Document was hereby received in evidence as Movants'
19 Exhibit M-335, as of this date.)

20 MR. GAFFEY: Thank you, Your Honor.

21 Another admission issue, Your Honor, has to do with --
22 we did put off the document issue. And if I can raise an issue
23 about one document now, I think it will help us to be much more
24 successful in reaching agreements as to many, many others.

25 I appeared to have picked up Mr. Hume's bad habit

1 about not being entirely explicit about offering documents in
2 evidence, and in particular --

3 THE COURT: Which you're chosen to blame him for.

4 MR. GAFFEY: Well, I'm not blaming him. Maybe he
5 learned it from me. I don't know.

6 During the testimony of Mr. Ainslie, the very first
7 witness in the case, I offered Exhibit M-142. It's an
8 e-mail -- exchange of e-mail correspondence between Mr.
9 Lubowitz and others at Weil Gotshal concerning a set of draft
10 board minutes. Your Honor may remember -- and I have the
11 transcript cite if we need it -- that Mr. Boies reacted to the
12 document by saying I had waived privilege. And we had a small
13 colloquy then about what the waiver had been before Mr. Boies
14 came to try the case and what the scope of it was. And in the
15 course of that, I did not offer the document.

16 And I would like to offer it now. I would like to
17 offer it for the reasons I stated its relevance at the time,
18 and also under Federal Rule of Evidence 102. And the reason I
19 would like to do that is because during that same examination
20 Mr. Boies put in several other sets of drafts. So for the sake
21 of completeness, I would like to offer 142 now, and I'm
22 prepared to show that to the Court to remind Your Honor of what
23 the document is.

24 THE COURT: I think I remember the document. But if
25 you have it and would like to show it so that I can be sure I

1 do remember it, that's fine.

2 MR. GAFFEY: If I may approach, Your Honor?

3 Just for the record, Your Honor, it's top line is --
4 it's an e-mail from Michael Lubowitz of Weil Gotshal to Rob
5 Miller of Weil Gotshal. It's dated September 16th, '08, board
6 meeting -- its entitled "8/9/16 board meeting minutes."

7 THE COURT: Is there any objection to the document?

8 MR. HUME: There is, Your Honor. I'd like to make two
9 points with my objection. First, the document itself. This is
10 Weil Gotshal e-mail, internal. It's being offered for the
11 truth of Mr. Lubowitz's assertion, "I don't recall the
12 reference to the sixty-four and seventy billion." This is him
13 passing on, "Here are a few nits." I think this is outside the
14 business record rule. This is not a substantive memo in his
15 e-mail. It's not a -- it's just forwarding on his nits.
16 Movants control Weil Gotshal. Weil Gotshal is the lawyer for
17 the debtor. They could have brought Mr. Lubowitz.

18 My second comment, Your Honor, is I had a discussion
19 with movants' counsel. We have a number of documents we'd like
20 to offer today which we told them. We decided to defer these
21 issues until the 18th. If we're going to allow Mr. Gaffey to
22 offer this, I'd at least like the chance to offer two or three
23 of my own so we could get the Court's feedback on it.

24 MR. GAFFEY: We can defer, Your Honor. The reason I'm
25 raising it now is this -- twofold. First let me respond

1 substantively and then to the issue of why now.

2 We are offering it to demonstrate that when Mr.
3 Lubowitz and Mr. Miller were at the board meeting, they get
4 this set of drafts. There's a reference in there to a wash.
5 I'm not offering it for the truth of Mr. Lubowitz's statement
6 about what he recalls or doesn't recall. I'm offering it for
7 the more limited purpose that the document shows that when it
8 was sent to Mr. Lubowitz who attended the board meeting, he,
9 while making changes in the same paragraph, did not remove the
10 reference to "wash". That's its limited purpose. It's not for
11 the truth of his assertion about what he remembers or what he
12 doesn't.

13 The reason I am raising it now and the reason I said
14 it would make our negotiations go a bit more easily, is we have
15 been having discussions about a lot of documents. And the deal
16 I offered last night was, in return for agreement to this one
17 document, which I think is evidence anyway -- and I'm being
18 clear here -- I'd be just the most agreeable guy you ever saw
19 about about fifty documents that they offer. If this is
20 admissible regardless of their agreement, I think it will make
21 the way much easier for an agreement as to what comes in and
22 what doesn't come in, on a pure negotiation basis. That's why
23 I'm standing to offer it now, to take it off the table.

24 MR. HUME: Well, it sounds like, in other words, that
25 way he doesn't have to agree to the fifty. One versus fifty

1 does sound like a good deal, Your Honor.

2 MR. GAFFEY: I'll agree to the same ones I put the
3 e-mail to Mr. Green last night, number by number.

4 MR. HUME: Okay. Thank you. One versus fifty does
5 sound like a good deal. If the fifty are plainly admissible
6 and the one is not, it may not be a good deal.

7 THE COURT: Let me suggest the following. I was not
8 aware we were really going to need the 18th as a date, and
9 apparently do, for purposes of hearing some of these ongoing
10 issues of admissibility. We have properly noticed for today an
11 argument which resulted in a ruling in respect of the PwC
12 documents. And that was really the principal business of
13 today. And like I said, we can have chambers conference, and
14 that's fine.

15 If we're really going to use the 18th as a holding
16 date for purposes of admitting the documents, and if there is
17 an ongoing process of communication, of communication between
18 counsel that may result in agreements regarding documents that
19 can be offered into evidence without objection, I think I'd
20 like to defer ruling on the Lubowitz document so as not to --
21 even though I know it would potentially facilitate ongoing
22 conversations, I'm also not inclined to change the dynamics of
23 those negotiations by making any ruling today on this document.

24 I remember these board minutes and I remember the
25 evolution of the board minutes during the examination so many

1 months ago of Mr. Ainslie. In effect, whether this document in
2 its form, Exhibit 142 is admitted or not admitted, probably
3 doesn't make a whole lot of difference to the Court in terms of
4 evaluating the overall evidence of the case. And I would hope
5 that the parties would recognize, as Mr. Gaffey generously did
6 during his presentation earlier, that this is a bench trial;
7 that I will apply the rules of evidence; but that I've already
8 seen all the evidence.

9 And with that, I suggest that you, consistent with the
10 philosophy of the Federal Rule of Evidence, endeavor to reach
11 agreement that will, as Mr. Hume said, allow for the
12 introduction of most documents such that I can weigh all
13 trustworthy evidence in the case. I have no doubt that
14 Movants' Trial Exhibit 142 is a trustworthy document. And to
15 fence over whether or not it should come in or not come in is
16 probably not a useful exercise for any of us.

17 MR. SCHILLER: Your Honor? I'm sorry.

18 THE COURT: Who would like to add?

19 MR. SCHILLER: I just want to confirm our
20 understanding, subject to your ruling on these exhibits and our
21 putting in the deposition designations from our case, that the
22 record's closed to evidence?

23 THE COURT: The evidence is closed, as far as I'm
24 concerned, subject to that.

25 MR. SCHILLER: Thank you.

1 MR. MAGUIRE: May I be heard on one thing, Your Honor?

2 THE COURT: Absolutely. And maybe the evidence is not
3 closed.

4 MR. MAGUIRE: It should actually be a couple of
5 things, Your Honor. One is, we do have a stipulation -- in
6 fact, three stipulations regarding the admissibility of
7 movants' exhibits. So if I could just hand up those
8 stipulations. They're a stipulation as to admission of
9 movants' exhibits dated April 30. I share the general
10 affliction here in not moving exhibits in in a timely way. Our
11 second stipulation is dated August 30. And the last one is
12 dated September 29. But all of these are stipulated to, Your
13 Honor.

14 THE COURT: Okay. Thank you.

15 MR. MAGUIRE: A second matter, in terms of the record,
16 Your Honor, is that while we've set aside the 18th to deal with
17 exhibits, I believe there's also a stipulation that the parties
18 have concerning deposition designations. And that provides
19 that the parties are supposed to confer, work out objections,
20 and subject to the objections, those designations will come in
21 evidence. We still need to confer, resolve whatever objections
22 there are, and in the case of any disagreement, bring that
23 before the Court. So we may need some time on the 18th if
24 there is any problem there.

25 THE COURT: Okay.

1 MR. MAGUIRE: And one additional matter. Mr. Schiller
2 is right in terms of there being no rebuttal witness and the
3 record being closed. There's just one asterisk I would like to
4 put on that. And that arises from Mr. Pfleiderer's testimony
5 the last couple of days.

6 You may recall that he put on the screen a
7 demonstrative showing Lehman's book values from the GFS system
8 over various dates from September 12 through the Lehman week.
9 The problem is, he testified, as I understand it, that the GFS
10 system was subject to a T+1 method. And that meant that the
11 books as of Friday, September 12, were finalized at 6 p.m. on
12 Monday the 15th. So to the extent the Court wants to have a
13 complete record of what Lehman's books were before Barclays
14 appeared on the scene, before the due diligence was done,
15 before the parties negotiated about values.

16 The Friday, September 12 information, that data, was,
17 as I understand it, finalized at 6 p.m. on Monday, after all of
18 the negotiations of the weekend. Dr. Pfleiderer did not do the
19 previous day before Barclays appeared on the scene or that
20 week. So what I've suggested to our colleagues at Barclays is
21 if they can provide us with a similar exhibit that just shows
22 that prior week, and specifically September 11. Because if the
23 T+1 principle -- if I understand it correctly, that would show
24 the information that was on Lehman's books and was finalized at
25 6 p.m. on Friday the 12th.

1 So that and the earlier dates, I think, would then
2 give us a complete picture of what the books were before and
3 after Barclays appeared on the scene. I'm hoping that's not
4 controversial. I've asked our colleagues to consider it.
5 They're conferring with their client. But I did want to
6 highlight that as one asterisk. It seems to me that's an
7 important piece of a factual record that the Court would want
8 to have in the record before we close everything completely.

9 THE COURT: If the parties agree on it. The problem
10 is if the parties don't agree, I'm not sure what you can do
11 about it.

12 MR. MAGUIRE: If we don't have an agreement, then I
13 think we may ask -- we'll obviously consider our position and
14 consider whether we come to the Court and ask for any relief on
15 that. Obviously, there'll be objections, and assuming that,
16 we'll have to argue the point.

17 THE COURT: Thank you for teeing up the issue.
18 Hopefully, it's resolved. If it's not resolved, we'll deal
19 with it on the 18th.

20 MR. MAGUIRE: Thank you, Your Honor.

21 THE COURT: Now, speaking about the 18th, how much
22 time do you propose for that day? And since it's more in the
23 nature of colloquy, are we talking about 10 a.m., are we
24 talking about 2 p.m., or what other time?

25 MR. SCHILLER: I think we're talking about one hour of

1 your time when it's convenient for Your Honor.

2 MR. GAFFEY: I think that's about right, Your Honor.

3 I think we're closer than it might sound from the carping going
4 here on documents. And we've heard what Your Honor has to say.
5 We just need to, I think, bring you up to date, for an hour or
6 an hour and a half.

7 THE COURT: Well, my only inquiry is whether if you
8 only need a limited period of time, would it be helpful for you
9 to be in the afternoon session as opposed to a morning session,
10 because that might give you some additional time to work out
11 any difficulties. It's a lot of time in the future, but I see
12 no reason why we need to show up early.

13 MR. GAFFEY: I think the afternoon makes more sense.
14 I think --

15 MR. SCHILLER: We agree.

16 THE COURT: Okay. Let's make it 2 o'clock on the
17 18th. And let me find out if I can get access to room 608,
18 which is down the hall. And that might be a more comfortable
19 way for us to have our chambers conference. If I can get
20 access to that, I'll let you know and we'll meet there in about
21 ten or fifteen minutes. If I can't get access to it, we'll use
22 the courtroom, and those people who are not to remain for the
23 conference will be excused. But my chambers staff will let you
24 know where we're meeting. Okay?

25 (Whereupon these proceedings were concluded at 11:56 a.m.)

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I N D E X

E X H I B I T S

MOVANTS '	DESCRIPTION	PAGE
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M-335	PwC Document	49

RULINGS

	Page	Line
PwC documents are	48	18
admitted for the		
purposes of		
demonstrating that an		
audit was conducted, and		
that the audit included		
some review and testing		
of judgments made by		
Barclays personnel of		
the Barclays valuation		

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a
true and accurate record of the proceedings.

PENINA WOLICKI

Veritext

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Date: October 11, 2010